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3 UNITED STATES DISTRICT COURT  
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
5 OAKLAND DIVISION  
6

7 GAYLE BROCK,

8 Plaintiff,

9 vs.

10 COUNTY OF NAPA and DOES 1 through  
11 50, inclusive,

12 Defendants.

Case No: C 11-0257 SBA

**ORDER**

Docket 28, 69

13 This action arises from the death of Theodore Scott Mostek ("Mostek") who  
14 committed suicide while incarcerated in the Napa County Jail. Mostek's mother, Gayle  
15 Brock ("Plaintiff"), commenced the instant action against Defendant County of Napa  
16 ("County") in the Napa County Superior Court alleging one state law claim for wrongful  
17 death. See Compl., Dkt. 1. On January 11, 2011, Plaintiff filed a second amended  
18 complaint ("SAC") alleging a federal claim under 42 U.S.C. § 1983 as well as five state law  
19 claims under California law. See SAC, Dkt. 1. The County removed the action to this  
20 Court on the basis of federal question jurisdiction. Notice of Removal, Dkt. 1.

21 The parties are presently before the Court on the County's motion for summary  
22 judgment or, in the alternative, partial summary judgment under Rule 56 of the Federal  
23 Rules of Civil Procedure. Dkt. 29. Plaintiff opposes the motion. Dkt. 40. Also before the  
24 Court is Plaintiff's ex parte application for leave to supplement her opposition. Dkt. 69.  
25 The County opposes the ex parte application. Dkt. 70. Having read and considered the  
26 papers filed in connection with these matters and being fully informed, the Court hereby  
27 DENIES Plaintiff's ex parte application for leave to supplement her opposition and  
28 GRANTS the County's motion for summary judgment on Plaintiff's federal claim under §

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1 1983. The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining  
2 state law claims, which are REMANDED to Napa County Superior Court. The Court, in its  
3 discretion, finds these matters suitable for resolution without oral argument. See  
4 Fed.R.Civ.P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

5 **I. BACKGROUND**

6 **A. Napa County Jail Operations**

7 The Napa County Jail is operated by the County. Johnson Decl. ¶ 2, Dkt. 31. The  
8 Napa County Department of Corrections ("NCDC"), a department of the County, is  
9 responsible for the coordination of all programs and services related to the care and  
10 management of inmates. Id. The County contracts with the California Forensic Medical  
11 Group ("CFMG") to provide medical care to inmates. Id. ¶ 3, Exh. A. CFMG employs or  
12 contracts with medical staff, e.g., nurses, doctors and other medical professionals, who  
13 provide health care for inmates at the jail. Id. ¶ 3.

14 The County and CFMG share responsibility for providing mental health care to  
15 inmates. Johnson Decl. ¶ 4. CFMG provides a psychiatrist to deliver diagnostic services,  
16 medication monitoring and 5150 evaluations of inmates. Id. NCDC Mental Health  
17 Services ("NCDCMHS") provides mental health staff who deliver outpatient mental health  
18 services, including screening, crisis intervention, counseling and continuing care, as well as  
19 services relating to safety cell placements and inmates placed in restraints. Id. ¶ 4, Exh. A.  
20 The County employs the correctional staff at the Napa County Jail. Id. ¶ 5. With the  
21 exception of first aid and cardiopulmonary resuscitation ("CPR"), correctional officers do  
22 not provide medical or mental health care to inmates. Id.

23 CFMG maintains medical and mental health records for Napa County Jail inmates.  
24 Johnson Decl. ¶ 6, Exh. A. NCDC correctional staff do not have access to inmates' medical  
25 and mental health records, which are confidential documents. Id. ¶ 6.

26 NCDC has a number of policies pertaining to inmate classification and housing,  
27 inmate safety, and the provision of medical and mental health care to Napa County Jail  
28 inmates. Johnson Decl. ¶ 7. Those policies include, but are not limited to: (1)

1 Classification; (2) Inmate Safety and Security Checks; (3) Sobering Cell; (4) Suicidal  
2 Inmates; (5) Medical and Dental; and (6) Special Transfers - Medical/Psychiatric Inmates.  
3 Id., Exhs. B-G.

4 **B. NCDC Training**

5 NCDC correctional officers receive on the job training with a Field Training Officer  
6 when they are first employed by NCDC. Johnson Decl. ¶ 20. As part of that training, the  
7 officers must read and become familiar with NCDC Policies and Procedures, including  
8 those relating to suicidal inmates. Id. NCDC correctional officers must also complete all  
9 training that is required by Title 15 of the California Code of Regulations, including the  
10 Corrections Officer Core Course and annual required training. Id. The Corrections Officer  
11 Core Course includes training relating to mental health issues, including suicide risk and  
12 prevention in correctional facilities. Id. ¶ 21.

13 **C. Mostek's January 2009 Incarceration**

14 On January 8, 2009, Mostek was incarcerated in the Napa County Jail. Johnson  
15 Decl. ¶ 8. At that time, a Medical Pre-Screening Questionnaire was completed in which  
16 Mostek indicated that he was taking pain medications (Norco and Oxycontin), he was  
17 currently under the care of a doctor for medical or psychiatric reasons, and that he had  
18 attempted suicide more than 10 years ago but was not feeling suicidal at that time. Id., Exh.  
19 H. Also on January 8, 2009, an Intake Triage Assessment form was completed, which  
20 states that Mostek has a bad back and was taking Norco and Oxycontin. Sterling Decl.,  
21 Exh. A at 70-71, Dkt. 30-1. In the "Plan & Comments" section of this form, it states "HC"  
22 and "Monitor . . . for opiate detox." Id. at 71. The "Placement" section of the form states  
23 "Holding Cell." Id.

24 On January 9, 2009, Mostek was seen by CFMG physician Dr. James Luders and  
25 placed on opiate detox protocol for heroin addiction with medications for a five-day period.  
26 Sterling Decl., Exh. A at 53. On January 14, 2009, the detox protocol was renewed for an  
27 additional three days. Id. at 60. According to Dr. Luders' progress notes dated January 14,  
28 2009, Mostek told him "I'm really having a lot of trouble here, I can't relax[.] I feel like

1 banging my head." Id. While on detox protocol, Mostek was housed in a holding cell,  
2 where he was checked twice every thirty minutes by NCDC staff and regularly checked by  
3 CFMG personnel. Johnson Decl. ¶¶ 9-10, Exh. I.

4 According to the "NCDC Chrono Log," Mostek was cleared by nursing to be housed  
5 in "GP" on January 12, 2009. Johnson Decl., Exh. I. On January 14, 2009, Mostek  
6 submitted an Inmate Request Form, requesting to be seen by medical staff. Sterling Decl.,  
7 Exh. A at 61. The form states that Mostek was "Feeling . . . suicidal because of deficiency  
8 of medication." Id. The Chrono log indicates Mostek was "moved to HC for obs" at 6:30  
9 p.m. on January 14, 2009. Johnson Decl., Exh. I.

10 On January 15, 2009, Mostek met with NCDCCMHS mental health counselor Dale  
11 Gardner ("Gardner"). Sterling Decl., Exh. A at 63. During this interview, Mostek  
12 demanded pain medication, to be taken out of the holding cell, and to be taken to court. Id.  
13 When Gardner asked Mostek whether he was currently suicidal, Mostek answered yes,  
14 stating that he thinks about it "all the time." Id. Gardner asked him the same question three  
15 more times with the "same results." Id. Mostek also told Gardner that he had "hung  
16 himself in the past and could do it again." Id. Following this meeting, Mostek was placed  
17 in a safety cell for his own protection. Id. at 57, 63; Johnson Decl. ¶ 12, Exh. I.

18 On January 16, 2009, Gardner met with Mostek in his safety cell. Sterling Decl.,  
19 Exh. A at 62. During this meeting, Mostek stated that "he wan [sic] not really suicidal;  
20 thought [he] could get his meds sooner." Id. Mostek then agreed "to safety and  
21 cooperation [with] officers" and was released from the safety cell. Id. at 58, 62. On  
22 January 19, 2009, Mostek was released from custody after bail was posted. Johnson Decl.  
23 ¶ 15, Exh. I.

24 **D. Mostek's March 2009 Incarceration**

25 On March 2, 2009, Mostek was incarcerated in the Napa County Jail for failure to  
26 appear in court while on bail. Turner Decl., Exh. F, Dkt. 42; Johnson Decl., Exh. I. The  
27 "Booking Report" indicates that Mostek was facing a "third strike" if convicted of the  
28 pending charges, which included, among other things, possession of a controlled substance

1 and first degree residential burglary. Id., Exh. F. In his Medical Pre-Screening  
2 Questionnaire, Mostek indicated that he was taking Oxycontin and Norco, was under a  
3 doctor's care for medical reasons (herniated discs), had a history of seizures, had never  
4 attempted suicide and did not feel suicidal at the time. Johnson Decl. ¶ 16, Exh. J. A  
5 "Housing Classification Form" dated March 2, 2009 states that Mostek has a prior history  
6 of violence, disciplinary actions, mental health issues, withdrawals, and suicide attempts.  
7 Turner Decl., Exh. I. This form notes that Mostek was placed in a safety cell on January  
8 15, 2009, and that Mostek "will withdraw from heroin." Id.

9  
10 On March 3, 2009, Mostek was placed on a five-day opiate detox protocol. Sterling  
11 Decl., Exh. A at 13, 20, 35. Mostek was also placed in a holding cell. Johnson Decl. ¶ 18,  
12 Exh. I. On March 8, 2009, the last day of the detox protocol, Mostek submitted an Inmate  
13 Request Form seeking renewal of his medications. Sterling Decl., Exh. A at 39. On March  
14 9, 2009, detox protocol was extended for two days, id. at 13, and Mostek was moved from a  
15 holding cell to a special housing cell in Tank 1. Johnson Decl. ¶ 18, Exh. I. Tank 1 is a  
16 group of 8 cells that surround and open into a central day room, where inmates have their  
17 out of cell activity time. Id. ¶ 18. The doors to the cells are barred, not solid, so when the  
18 inmates are in their cells, each inmate can see into the day room and into some of the other  
19 cells, and they can hear and speak to each other. Id. The door into Tank 1 is also barred, so  
20 correctional officers and other people in the hallway outside of Tank 1 can hear the inmates  
21 housed in the Tank 1 cells. Id.

22 On March 11, 2009, when detox medications were scheduled to end, Mostek  
23 submitted two Inmate Request Forms, requesting to be seen by medical and mental health  
24 staff. Sterling Decl., Exh. A at 38, 42.<sup>1</sup> On March 13, 2009, Mostek submitted another  
25 Inmate Request Form, asking for a "double mattress due to degenerated and herniated  
26 disks," a "CAT scan and X-ray due to chronic [back] pain + degeneration" and "Neurotin

27 <sup>1</sup> The handwriting on the forms submitted by Mostek is illegible. The County  
28 contends that both forms request medications. Def.'s Mtn. at 4. Plaintiff does not dispute  
this contention.

1 [and] SOMA for pain and suffering." Id. at 37.

2 On March 13, 2009, CFMG staff responded to one of Mostek's March 11, 2009  
3 request forms, stating "Please give us the name and location of your treating physician and  
4 sign release of information so we can get your medical history. Also please give us details  
5 of this scheduled CAT scan." Sterling Decl., Exh. A at 38. On March 14, 2009, CFMG  
6 staff responded to Mostek's March 13, 2009 request form in writing, stating that "You will  
7 need to provide your own Gabapentin if our Dr. decides to order it. I will refer your request  
8 for 2nd mattress to Dr. Luders." Id. at 37. Mostek was also seen by CFMG staff on March  
9 14, 2009 and told that CFMG would "Fax ROI to North Bay Regional for collateral info,  
10 refer to M.D. for order for 2nd matt." See id. at 36. On March 16 and/or March 17, CFMG  
11 staff met with Mostek regarding his complaints of pain. Id. at 34. At this meeting, Mostek  
12 requested Neurontin, SOMA or Norco, or alternatively, Baclofen. Id. Mostek was offered  
13 Motrin or Tylenol for pain but he refused to take either medication because they "upset his  
14 stomach."

15 On March 16, 2009, Gardner met with Mostek. Sterling Decl., Exh. A at 41.  
16 During this meeting, Mostek informed Gardner that he needed Neurontin because it kept  
17 him "on an even keel." Id. Gardner's notes from the meeting state, in part, "Reported S/i  
18 and Safety Cell placement in facility; cut wrists." Id. In his deposition, Gardner explained  
19 "s/i" means Mostek "reported suicide in the past." Gardner Dep. at 70:2-3, Dkt. 43. When  
20 asked if "he reported suicide, and that he was put in the safety cell at this facility," Gardner  
21 answered "Yes." Id. at 70:4-5. Gardner also testified that he did not recall asking medical  
22 personnel about whether Mostek had cut his wrists or not. Id. at 74:8-75:3. However,  
23 Gardner stated that he knew Mostek had not cut his wrists "in the last period that he was  
24 [incarcerated] at Napa County" (i.e., January 2009) because he had reviewed the "previous  
25 two notes" before the interview. Id. at 70:22-71-8. Gardner also testified that he did not  
26 investigate Mostek's claim of previous suicide attempts and did not know Mostek was  
27 facing a third strike when he interviewed him on March 16, 2009. Id. at 59:13-25, 79:18-  
28 23. At the March 16, 2009 meeting, Mostek did not tell Gardner he was facing a third

1 strike. Id. at 80:11-13

2 On March 17, 2009, a Health Inventory and Communicable Disease Screening form  
3 was completed and signed by Mostek, which states, among other things, that Mostek had  
4 back problems, a history of mental health treatment and a history of seizures. Sterling  
5 Decl., Exh. A at 48. The form also states that Mostek did not have any suicidal thoughts at  
6 that time or history of suicide attempts, and that he is currently working with "mental  
7 health." Id.

8 On March 18, 2009, Gardner referred Mostek to a CFMG Telepsychiatrist for an  
9 appointment regarding his request for Neurontin. Gardner Dep., Exh. E. On that same day,  
10 Mostek spoke with Dr. Stancil Johnson regarding his request for Neurontin. Sterling Decl.,  
11 Exh. A at 40. According to Dr. Johnson's report, Mostek told Dr. Johnson that he was  
12 facing a third strike, that he had a history of being bipolar and having manic episodes, and  
13 that he wants to be placed on Neurontin for seizures. Id. Dr. Johnson's report states that  
14 Mostek had not been evaluated by CFMG on "the medical side for this and I specifically  
15 ask they do so." Id. Dr. Johnson told Mostek that he could not prescribe him Neurontin;  
16 noting that he "did not get a sufficient history of bipolar to warrant psychotropic medication  
17 at this point." Id. Instead, Dr. Johnson prescribed Mostek "doxepin" for 30 days,<sup>2</sup> stating  
18 that he would "entertain the history of bipolar disorder and make further evaluation and try  
19 to stabilize what symptomatology [he] see[s] now with psychotropic medication and await  
20 further development on the history of seizures from the medical side." Id.

21 On March 20, 2009, during a routine safety and security check at about 2:30 a.m.,  
22 correctional officer Adam Rusin found Mostek in his cell "hanging by his neck with what  
23

24  
25  
26 <sup>2</sup> At his deposition, Dr. Johnson testified that he prescribed Mostek Doxapram,  
27 which is an "old antidepressant" that would "take away some of [Mostek's] anxiety."  
28 Johnson Dep. at 25:20-26:4, Dkt. 30-2. Dr. Johnson prescribed Mostek a dose of 50  
milligrams of Doxapram, which he testified would operate as a "calming agent." Id. at  
26:1-4.



1 appeared to be a piece of bed sheet."<sup>3</sup> Johnson Decl., Exh. K. Officer Rusin radioed for  
 2 assistance and cut Mostek down. Id. At around 2:31 a.m., several NCDC officers and a  
 3 CFMG nurse responded to Mostek's cell. Id. At about 2:32 a.m., the nurse examined  
 4 Mostek and found no pulse. Id. At this time, a correctional officer left Mostek's cell to call  
 5 911. Id. The nurse and correctional officers performed chest compressions on Mostek  
 6 from 2:32 a.m. until approximately 2:42 a.m., when the Napa City Fire and Paramedics  
 7 arrived. Id. Shortly thereafter, the paramedics declared Mostek dead. Id.

## 8 **II. DISCUSSION**

### 9 **A. Legal Standard**

10 "A party may move for summary judgment, identifying each claim . . . or the part of  
 11 each claim . . . on which summary judgment is sought. The court shall grant summary  
 12 judgment if the movant shows that there is no genuine dispute as to any material fact and  
 13 the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A material fact  
 14 is one that could affect the outcome of the suit under the governing substantive law.  
 15 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). For a dispute to be "genuine,"  
 16 a reasonable jury must be able to return a verdict for the nonmoving party. Id.

17 The moving party bears the initial burden of demonstrating the absence of a  
 18 "genuine issue of material fact for trial." Anderson, 477 U.S. at 256 (1986). When the  
 19 nonmoving party bears the burden of proving the claim, the moving party need only point  
 20 out through argument that the nonmoving party does not have enough evidence of an  
 21 essential element of his claim to carry his ultimate burden of persuasion at trial. Devereaux  
 22 v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001); Fairbank v. Wunderman Cato Johnson, 212  
 23 F.3d 528, 532 (9th Cir. 2000).

24 Once the moving party has met its burden, the burden shifts to the nonmoving party  
 25

26  
 27 <sup>3</sup> Correctional officer Kevin Skillings talked to Mostek on "the day [he] died." Dkt.  
 28 42. When asked to describe Mostek's demeanor, Officer Skillings stated that Mostek "was  
 always quiet, and he just kept to himself, and that's the way he was that night, too."  
 Skillings Dep. at 14:21-15:2, Dkt. 43.



1 to designate specific facts showing a genuine issue for trial. Celotex Corp. v. Catrett, 477  
2 U.S. 317, 324 (1986). A party asserting that a fact is genuinely disputed must support the  
3 assertion by "citing to particular parts of materials in the record, including depositions,  
4 documents, electronically stored information, affidavits or declarations, stipulations  
5 (including those made for purposes of the motion only), admissions, interrogatory answers,  
6 or other materials." Fed.R.Civ.P. 56(c)(1)(A).

7  
8 To carry its burden, the nonmoving party must show more than the mere existence  
9 of a scintilla of evidence, Anderson, 477 U.S. at 252, and "do more than simply show that  
10 there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co.,  
11 Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In fact, the nonmoving party must  
12 come forth with evidence from which a jury could reasonably render a verdict in the  
13 nonmoving party's favor. Anderson, 477 U.S. at 252. In determining whether a jury could  
14 reasonably render a verdict in the nonmoving party's favor, all justifiable inferences are  
15 drawn in the nonmoving party's favor. Id. at 255. Nevertheless, inferences are not drawn  
16 out of the air, and it is the opposing party's obligation to produce a factual predicate from  
17 which the inference may be drawn. Dias v. Nationwide Life Ins. Co., 700 F.Supp.2d 1204,  
18 1214 (E.D. Cal. 2010). To establish a genuine dispute of material fact, a Plaintiff must  
19 present affirmative evidence; bald assertions that genuine issues of material fact exist are  
20 insufficient. Galen v. County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007). Further,  
21 evidence that is merely colorable or that is not significantly probative, is not sufficient to  
22 withstand a motion for summary judgment. Anderson, 477 U.S. at 249-250 (citations  
23 omitted).

24 It is not the court's task "to scour the record in search of a genuine issue of triable  
25 fact." Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996). Counsel have an obligation to  
26 lay out their support clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d 1026, 1031 (9th  
27 Cir. 2001). The court "need not examine the entire file for evidence establishing a genuine  
28 issue of fact, where the evidence is not set forth in the opposition papers with adequate  
references so that it could conveniently be found." Id. The gist of a summary judgment

1 motion is to require the adverse party to show that it has a claim or defense, and has  
2 evidence sufficient to allow a jury to find in its favor on that claim or defense. Id.

3 **B. Ex Parte Application for Leave to Supplement Opposition**

4 Plaintiff requests leave to supplement her opposition to include "newly found  
5 information." Dkt. 69. Specifically, Plaintiff seeks to add information that "another inmate  
6 at the Napa County Jail committed suicide in the same manner as decedent in the present  
7 case . . . on November 1, 2012." Id. The County opposes Plaintiff's application on the  
8 ground that Plaintiff has failed to demonstrate that this evidence is relevant to any issue in  
9 this case. Dkt. 70. Under Civil Local Rule 7-3(d), once a reply has been filed, no  
10 additional memoranda, papers or letters may be filed without prior Court approval, except  
11 in two narrow circumstances: (1) if new evidence has been submitted in the reply; or (2) if  
12 the additional memoranda, paper or letter brings to the Court's attention a relevant judicial  
13 opinion published after the date the opposition or reply was filed. Civ. L.R. 7-3(d).

14 The Court finds that Plaintiff has failed to demonstrate that leave to supplement her  
15 opposition is warranted. Plaintiff's request does not fall within the two narrow  
16 circumstances set forth under Civil Local Rule 7-3(d). Nor has Plaintiff shown good cause  
17 to supplement her opposition. Plaintiff has failed to show that the information she seeks to  
18 add to her opposition is relevant to the resolution of any issue before the Court on the  
19 County's motion for summary judgment. Plaintiff's ex parte application does not explain  
20 why a suicide that occurred at the Napa County Jail in November 2012 is relevant to the  
21 claims in this case, which arise out of a suicide that occurred in March 2009. Accordingly,  
22 Plaintiff's ex parte application for leave to supplement her opposition is DENIED.

23 **C. Evidentiary Objections**

24 In its reply brief, the County contends that certain Grand Jury Reports referenced in  
25 Plaintiff's opposition are inadmissible. Def.'s Reply at 18-19. Specifically, the County  
26 objects to the Grand Jury Reports on the grounds that they are not authenticated, they  
27 "contain inadmissible opinion testimony by unknown lay persons," and they include  
28 "multiple levels of hearsay." Id. at 19. In addition, the County argues that the reports

1 "should be excluded under FRE 403 due to the risk of unfair prejudice and confusion of the  
2 issues." Id. at 20. Plaintiff did not respond to this objection.

3 A review of Plaintiff's opposition reveals that Plaintiff does not cite to any portion of  
4 a Napa County Grand Jury Report in support of her position. Instead, the reports are  
5 referenced in connection with the opinion of Plaintiff's correctional expert, Jeffrey Hislop.<sup>4</sup>  
6 See Pl.'s Opp. at 2, 15, 21. Plaintiff's opposition states that certain Napa County Grand Jury  
7 Reports were "considered as part of the opinion of [her] expert witness . . . Hislop." Id. at  
8 2.<sup>5</sup> Federal Rule of Evidence 703 allows an expert to base an opinion "on facts or data in  
9 the case that the expert has been made aware of or personally observed. If experts in the  
10 particular field would reasonably rely on those kinds of facts or data in forming an opinion  
11 on the subject, they need not be admissible for the opinion to be admitted." Fed.R.Evid.  
12 703; see United States v. W.R. Grace, 504 F.3d 745, 763 (9th Cir. 2007). The County does  
13 not argue that the Grand Jury Reports are not the kind of facts or data that experts in  
14 Hislop's field would "reasonably rely on." Accordingly, the County's objections to the  
15 Grand Jury Reports are OVERRULED. Moreover, because Plaintiff does not cite to any  
16 portion of a Grand Jury Report in her opposition, the Court does not rely on any statements  
17 contained in the reports considered by Hislop in resolving the instant motion. As such, the  
18 County's request to exclude the evidence is DENIED as MOOT.

19  
20  
21  
22 <sup>4</sup> According to Hislop, his "area of expertise includes but is not limited to: use of  
23 force; less lethal alternatives to deadly force (equipment and tactics); modern police  
24 administration and supervision, including policies, procedures, and current law enforcement  
practices; firearms, internal affairs investigations and disciplinary matters; special weapons  
and tactics administration and training; custody/corrections operations and policy and  
procedures." Dkt. 22.

25 <sup>5</sup> Hislop avers that he reviewed Napa County Grand Jury Reports for 2005-2010 and  
26 "discovered," among other things that the "Grand Juries" have reported numerous issues  
27 including: lack of adequate leadership, the accidental early release of over 25 inmates from  
28 the jail, concern over the use of the inmate welfare fund, concern over NCDC's failure to  
monitor recidivism, concern regarding the safety of the corrections guards at the facility,  
and concerns regarding NCDC's ability to properly manage and handle the mentally ill.  
Hislop Decl. ¶ 2.

1 The County also objects to Plaintiff's reliance on "statements made by Ernest Crane  
2 (sic), the inmate who was housed in the cell next to Mostek at the time of Mostek's death."  
3 Def.'s Reply at 20. The only mention of Ernest Craine in Plaintiff's opposition appears on  
4 page 8. Plaintiff's opposition states in full: "Ernest Craine, inmate in the cell right next to  
5 Mostek, said that he heard a noise and knew that something had happened to Mostek but  
6 did not try to call out because he knew that no one would hear him." Id. at 8. The County  
7 argues that Craine was not deposed in this case and "his statements are not sworn but are  
8 contained in the Coroner's investigative report prepared by Deputy Matthew Macomber,"  
9 and, as such, "constitute hearsay and are inadmissible under FRE 801." Id. The County  
10 further argues that even if Deputy Macomber's "report itself is a business record under FRE  
11 803 or subject to some other exception to the hearsay rule, Craine's statements are a second  
12 level of hearsay, and there is no exception that applies to them." Id. at 20. Plaintiff did not  
13 respond to this objection.

14 Pursuant to Federal Rule of Evidence 803(8), in a civil case, a record or statement of  
15 a public office setting forth "factual findings resulting from a legally authorized  
16 investigation" are not excluded by the hearsay rule, unless the sources of information or  
17 other circumstances indicate lack of trustworthiness. Fed.R.Evid. 803(8). Even assuming  
18 that the investigative report prepared by Deputy Macomber is admissible under the public-  
19 records exception under 803(8), it is well established that statements made by third persons  
20 not under a "duty to report" must satisfy a separate hearsay exception in order to be  
21 admissible. See Lang v. Cullen, 725 F.Supp.2d 925, 960 (C.D. Cal. 2010) (Bemis v.  
22 Edwards, 45 F.3d 1369, 1372 (9th Cir. 1995)). Accordingly, because Plaintiff has not  
23 shown that Craine's statements are independently admissible under an exception to the  
24 hearsay rule, the County's objection is SUSTAINED.

25 **D. Motion for Summary Judgment**

26 **1. 42 U.S.C. § 1983**

27 The operative complaint does not allege any claims against an individual Defendant.  
28 See SAC. The only named Defendant is the County. Id. The SAC alleges that unnamed

1 County employees working at the time of Mostek's death were specifically informed by  
2 Mostek that he would terminate his life if placed in a solitary confinement cell with a sheet  
3 or similar item. Id. ¶ 11. The SAC further alleges that unnamed County employees had  
4 knowledge to a substantial certainty that Mostek would commit suicide after being placed  
5 in a solitary confinement cell and that "said defendants" knowingly and intentionally placed  
6 him in the cell with a bed sheet or other similar item. Id. The SAC also alleges that "said  
7 defendants" acted with deliberate indifference with regard to Mostek's life when they  
8 placed him in a solitary confinement cell with a bed sheet or similar item. Id. According to  
9 Plaintiff, Mostek's death was caused by the County "because of its official policies" and "its  
10 customs and practices," which were followed by "defendant employees." Id. ¶ 12. Plaintiff  
11 claims that "said policies, customs and practices were the 'moving force' behind the  
12 deprivation of plaintiff's constitutional rights." Id. ¶ 13.

13 The County moves for summary judgment on the ground that Plaintiff does not have  
14 evidence of an official policy, custom or practice that gives rise to municipal liability under  
15 § 1983. Def.'s Mtn. at 12-22. In response, Plaintiff contends that summary judgment is  
16 inappropriate because there is a genuine dispute of material fact as to whether the County:  
17 (1) failed to provide adequate suicide prevention training to its officers; (2) was deliberately  
18 indifferent to the medical needs of Mostek; (3) was deliberately indifferent in creating and  
19 enforcing its own official policies regarding suicide prevention, housing of inmates, and  
20 medical and psychological training and care; and (4) employed a standard operating  
21 procedure of deliberate indifference toward the inmates at the jail based upon its "numerous  
22 failures." Pl.'s Opp. at 11-23.

23 Although the Fourteenth Amendment's Due Process Clause, rather than the Eighth  
24 Amendment's protection against cruel and unusual punishment, applies to pretrial  
25 detainees, the same standards are applied in both cases. Simmons v. Navajo Cnty., Ariz.,  
26 609 F.3d 1011, 1017 (9th Cir. 2010). The Supreme Court has held that the Eighth  
27 Amendment imposes a duty upon prison officials to provide humane conditions of  
28 confinement, including ensuring that inmates "receive adequate food, clothing, shelter, and

1 medical care" and "taking reasonable measures to guarantee the safety of the inmates."  
2 Farmer v. Brennan, 511 U.S. 825, 833 (1994) (internal quotation marks omitted).

3 Title 42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of  
4 any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to  
5 be subjected, any citizen of the United States or other person within the jurisdiction thereof  
6 to the deprivation of any rights, privileges, or immunities secured by the Constitution and  
7 laws, shall be liable to the party injured in an action at law, suit in equity, or other proper  
8 proceeding for redress . . . ." A municipality or other local government may be liable under  
9 § 1983 if the governmental body itself "subjects" a person to a deprivation of rights or  
10 "causes" a person 'to be subjected' to such deprivation." Connick v. Thompson, 131 S.Ct.  
11 1350, 1359 (2011) (citing Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 692  
12 1978)). Because a County cannot be held vicariously liable under § 1983 for their  
13 employees actions, plaintiffs who seek to impose liability on a County under § 1983 must  
14 prove that "action pursuant to official municipal policy" caused their injury. Connick, 131  
15 S.Ct. at 1359.

16 To establish municipal liability under § 1983, a plaintiff must show that (1) he was  
17 deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to a  
18 deliberate indifference to his constitutional rights; and (4) the policy was the moving force  
19 behind the constitutional violation. Burke v. County of Alameda, 586 F.3d 725, 734 (9th  
20 Cir. 2009). A County may be held liable under § 1983 under three theories. Clouthier v.  
21 Cnty. of Contra Costa, 591 F.3d 1232, 1249 (9th Cir. 2010). First, a County may be held  
22 liable when implementation of its official policies or established customs inflicts the  
23 constitutional injury. Id. Second, a County may be held liable under § 1983 for acts of  
24 "omission," when such omissions amount to the local government's own official policy.  
25 Clouthier, 591 F.3d at 1249. Third, a County may be held liable under § 1983 when the  
26 individual who committed the constitutional tort was an official with final policy-making  
27 authority or such an official ratified a subordinate's unconstitutional decision or action and  
28 the basis for it. Id. at 1250.

**a. Failure to Train**

Plaintiff contends that there is a triable issue of fact as to whether the County failed to provide adequate training to its correctional officers. Pl.'s Opp. at 11. A § 1983 plaintiff alleging a policy of failure to train must show: (1) that a County employee violated plaintiff's constitutional rights; (2) that the County has a custom or policy that amounts to deliberate indifference; and (3) that this custom or policy was the moving force behind the employee's violation of plaintiff's constitutional rights in the sense that the County could have prevented the violation with an appropriate policy. Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1194 (9th Cir. 2002).

"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." Connick, 131 S.Ct. at 1359. "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." Id. To satisfy the statute, a municipality's failure to train must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." Id. (quoting City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989)).

"[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his or her action." Connick, 131 S.Ct. at 1360 (quotation marks omitted). "Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." Id.

"A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." Connick, 131 S.Ct. at 1360. "Policymakers' continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the deliberate indifference—



1 necessary to trigger municipal liability." Id. (internal quotation marks omitted). "Without  
2 notice that a course of training is deficient in a particular respect, decisionmakers can  
3 hardly be said to have deliberately chosen a training program that will cause violations of  
4 constitutional rights." Id. In City of Canton, however, the Court did not foreclose the  
5 possibility that, "in a narrow range of circumstances," the unconstitutional consequences of  
6 failing to train could be "so patently obvious" that a municipality could be liable under §  
7 1983 without proof of a pre-existing pattern of violations. Connick, 131 S.Ct. at 1361.

8 Finally, in addition to proving deliberate indifference, the plaintiff must prove that  
9 the alleged training deficiency was the moving force that actually caused the constitutional  
10 violation. See Connick, 131 S.Ct. at 1358 n. 5. "[P]roving that a municipality itself  
11 actually caused a constitutional violation by failing to train the offending employee presents  
12 difficult problems of proof, and [a court] must adhere to a stringent standard of fault, lest  
13 municipal liability under § 1983 collapse into respondeat superior." Connick, 131 S.Ct. at  
14 1365 (internal quotation marks omitted).

15 Here, Plaintiff broadly contends that the "officers at the jail were not adequately  
16 trained in suicide prevention" because all of the "officers deposed" by Plaintiff testified that  
17 they were "not regularly trained in suicide prevention, if . . . they were trained at all." Pl.'s  
18 Opp. at 13. In support of this contention, Plaintiff relies on the opinion of her correctional  
19 expert, Hislop. Id. Hislop opines that the correctional officers at the Napa County Jail  
20 were not adequately trained because suicide training was not conducted on a "regular  
21 basis," i.e., "once every two years." Hislop Decl. ¶ 12. In his expert report, Hislop  
22 concludes that "[t]here was evidence that the jail staff responsible for the care as well as  
23 custody of the inmates were insufficiently trained. There was evidence that suicide  
24 prevention training was not conducted regularly or frequently. Responding staff were not  
25 properly trained or equipped to administer CPR." Dkt. 22. In reaching this conclusion,  
26 Hislop states that "[t]he officers were vague as to the frequency and specifics of suicide  
27 prevention training. One C/O mentioned that the training received was applicable to street  
28 officers rather than custody situations. . . . CPR updates appeared not to have occurred.

1 Staff did not respond with or use cpr masks." Id. According to Plaintiff, the "alleged  
2 training at the jail on suicide prevention (if any) was . . . woefully inadequate based on the  
3 depositions of the officers." Pl.'s Opp. at 14.

4 Plaintiff has not adduced evidence establishing a "pattern of similar constitutional  
5 violations by untrained employees" from which the Court can draw the inference that the  
6 County was aware that its suicide training was inadequate and chose to do nothing in the  
7 face of this knowledge. While Plaintiff asserts that "there were two suicides and three  
8 attempted at the jail in one year," Pl.'s Opp. at 15, Plaintiff does not argue or proffer any  
9 evidence showing that there were any prior incidents "similar to the violation at issue here"  
10 such that a reasonable jury could find that the County was "on notice that specific training  
11 was necessary to avoid this constitutional violation." Connick, 131 S.Ct. at 1360.

12 In support of her assertion that "there were two suicides and three attempted at the  
13 jail in one year," Plaintiff cites paragraphs 2 and 17 of Hislop's declaration. However,  
14 neither of these paragraphs mention any suicide or attempted suicide at the Napa County  
15 Jail. A review of the record reveals that support for Plaintiff's assertion is found in Hislop's  
16 expert report. According to Hislop, "[t]here were two suicides in 2009 as well as three  
17 more attempts." Dkt. 22. Hislop's report, however, does not identify the specific factual  
18 basis for this statement or provide any description or explanation of the circumstances  
19 surrounding the "two suicides in 2009 as well as three more attempts." As such, it is  
20 unclear whether these incidents are similar to the constitutional violation alleged in this  
21 case. In addition, it is unclear whether these incidents occurred before or after Mostek's  
22 death in March 2009. See Connick, 131 S.Ct. at 1360 n.7 ("contemporaneous or  
23 subsequent conduct cannot establish a pattern of violations that would provide 'notice to the  
24 cit[y] and the opportunity to conform to constitutional dictates' "). The evidence adduced  
25 by Plaintiff does not establish a genuine issue of material fact on the issue of whether there  
26 was a pattern of similar constitutional violations by untrained County employees.

27 Without evidence of any other prior similar constitutional violations of the kind  
28 alleged in this case, Plaintiff cannot establish liability unless Plaintiff demonstrates that the

1 "single-incident" theory of municipal liability applies. Although a pattern of similar  
2 constitutional violations by untrained employees is "ordinarily necessary" to demonstrate a  
3 municipality's "deliberate indifference" for purposes of a failure to train claim, a plaintiff  
4 can rely on a "single-incident" theory that the constitutional violation was the "obvious"  
5 consequence of inadequate training. Connick, 131 S.Ct. at 1360-1361 (citations omitted).  
6 Under this theory, Plaintiff must establish that this case presents one of those "rare"  
7 circumstances the Supreme Court hypothesized in City of Canton in which the need for  
8 training is so obvious that the County's failure to provide that training amounts to deliberate  
9 indifference to constitutional violations. See Canton, 489 U.S. at 390 n. 10; see Connick,  
10 131 S.Ct. 1361 (the possibility of "single-incident liability" theory left open by City of  
11 Canton exists only "in a narrow range of circumstances" where "the unconstitutional  
12 consequences of failure to train [are] patently obvious").<sup>6</sup> These "circumstances" generally  
13 involve incidents arising from a total lack of training, not simply an assertion that a  
14 municipal employee was not trained about "the specific scenario related to the violation."  
15 Connick, 131 S.Ct. at 1363.

16 The Court finds that Plaintiff has failed to establish a genuine issue of material fact  
17 as to whether the County is liable under the "single-incident" theory of liability. Plaintiff  
18 has not presented evidence from which a reasonable jury could conclude that Mostek's  
19 death was the "patently obvious" consequence of the County's failure to provide specific  
20 training such that Plaintiff need not show a pattern of similar constitutional violations by  
21 untrained employees to demonstrate the County's deliberate indifference. Plaintiff has not  
22 shown that this case falls within that "narrow" and "rare" range of cases hypothesized by  
23

24 \_\_\_\_\_  
25 <sup>6</sup> The rare situation was described in City of Canton through "the hypothetical  
26 example of a city that arms its police force with firearms and deploys the armed officers  
27 into the public to capture fleeing felons without training the officers in the constitutional  
28 limitation on the use of deadly force." Connick, 131 S.Ct. at 1361. The Court's hypothesis  
was premised on the assumption that the municipality had decided not to train its officers  
about the constitutional limits of the use of force. Id. Under such circumstances, the highly  
predictable consequence that deadly force could be misused in violation of citizens' rights  
could be deemed so obvious as to reflect deliberate indifference. Id.

1 City of Canton based upon an "obvious need for some form of training," particularly since  
2 Plaintiff failed to demonstrate a complete lack of suicide training, establish the existence of  
3 a "particular glaring omission" in the County's suicide training program, or show that the  
4 correctional officers had an "utter lack of an ability to cope with constitutional situations"  
5 that existed in the hypothesized single-incident case. See Connick, 131 S.Ct. 1361, 1363;  
6 Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 409-410 (1997).

7  
8 Indeed, Plaintiff has not shown that the County's training program is inadequate, let  
9 alone that the County's failure to train reflects a "deliberate" or "conscious" choice by the  
10 County that amounts to a policy for which the County is responsible. The County has  
11 presented evidence that its correctional officers are provided suicide prevention training,  
12 including suicide prevention training as part of their "Core Course" training and as part of  
13 their on the job training. See Johnson Decl. ¶¶ 20-21, Exh. L. In response, Plaintiff has not  
14 adduced evidence establishing a particular omission or deficiency in the County's suicide  
15 prevention program. Instead, Plaintiff generally argues that the training received by  
16 correctional officers was inadequate because the officers were not trained in suicide  
17 prevention on a regular basis. Pl.'s Opp. at 13. In support of her position, Plaintiff focuses  
18 on the deposition testimony of four correctional officers regarding the training they recalled  
19 receiving. See id. at 13-15.

20 Specifically, Plaintiff asserts that Officer "Russin (sic) testified that he did not  
21 receive any training before the incident and alleged 'minor' training after the incident"; that  
22 Officer "Skillings testified to details of his training at the academy, but no details regarding  
23 training specific to suicide prevention at the jail"; that Officer "Kemp testified that he only  
24 received on the job training and that his training consisted of no required coursework or  
25 review of policies, and that he was permitted to train other officers after receiving that  
26 training"; and that Officer "Daniels . . . did not seem to know a definite policy for dealing  
27 with 'despondent' inmates." Pl.'s Opp. at 14-15. In support of these assertions, Plaintiff  
28 cites "See declaration of Jesse Turner," id., which does not comply with Rule 56. See  
Fed.R.Civ.P. 56(c)(1)(A) (a party asserting that a fact is genuinely disputed must support

1 the assertion by "citing to particular parts of materials in the record"). To demonstrate a  
2 genuine issue for trial, the party opposing summary judgment must direct the court's  
3 attention to specific, triable facts; general references without page or line numbers are not  
4 sufficiently specific. See Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 889  
5 (9th Cir. 2003); see also Forsberg v. Pac. Northwest Bell Tel. Co., 840 F.2d 1409, 1418  
6 (9th Cir. 1988) (courts are not required to comb the record to find some reason to deny a  
7 motion for summary judgment).

8 Moreover, Plaintiff's failure to train argument fails because when a municipality's  
9 culpability for a deprivation of rights is predicated on a failure to train, " 'the focus must be  
10 on the adequacy of the training program in relation to the tasks the particular officers must  
11 perform," and not merely on the training deficiencies of specific officers. See City of  
12 Canton, 489 U.S. at 390-391 ("That a particular officer may be unsatisfactorily trained will  
13 not alone suffice to fasten liability on the city, for the officer's shortcomings may have  
14 resulted from factors other than a faulty training program."); Blankenhorn v. City of  
15 Orange, 485 F.3d 463, 484-485 (9th Cir. 2007) ("[A]bsent evidence of a program-wide  
16 inadequacy in training, any shortfall in a single officer's training can only be classified as  
17 negligence on the part of the municipal defendant—a much lower standard of fault than  
18 deliberate indifference."); Lewis v. City of West Palm Beach, Fla., 561 F.3d 1288, 1293  
19 (11th Cir. 2009) (because the focus must be on the adequacy of the training programs in  
20 relation to the tasks the particular officers must perform, it is irrelevant what training each  
21 specific officer present at the scene was given or retained). The fact that further training  
22 might have prevented any violation is insufficient to "fasten" liability on the municipal  
23 actor. See City of Canton, 489 U.S. at 391 ("Neither will it suffice to prove that an injury  
24 or accident could have been avoided if an officer had had better or more training, sufficient  
25 to equip him to avoid the particular injury-causing conduct. Such a claim could be made  
26 about almost any encounter resulting in injury, yet not condemn the adequacy of the  
27 program to enable officers to respond properly to the usual and recurring situations with  
28 which they must deal. And plainly, adequately trained officers occasionally make

1 mistakes; the fact that they do says little about the training program or the legal basis for  
2 holding the city liable.").

3 Furthermore, even assuming that there was a failure to train and that the County was  
4 deliberately indifferent to the consequences of that lack of training, Plaintiff has failed to  
5 establish that the alleged inadequate training was the moving force behind Mostek's death.  
6 Plaintiff has not identified a nexus between Mostek's death and a particular deficiency in  
7 the correctional officers' training that would have been avoided had the officers been  
8 trained under a program that was not deficient in the identified respect. According to  
9 Plaintiff, her correctional expert concluded that Mostek's death was "caused by the conduct  
10 of [the] County, including [the] failure to train on an obvious issue." Pl.'s Opp. at 16. In  
11 support of this conclusory assertion, Plaintiff directs the Court to paragraphs 12-14 and 17  
12 of Hislop's declaration." Id.

13 In his declaration, Hislop concludes that officers at the Napa County Jail were not  
14 adequately trained. Hislop Decl. ¶¶ 13, 17. Hislop avers that "[t]here was overall, obvious  
15 lack of training including an *apparent* lack of CPR training. . . ." Id. (emphasis added).  
16 Hislop bases this conclusion on his "brief review" of the "alleged" training records of  
17 several correctional officers and their deposition testimony. Id. ¶¶ 13-14, 17. With regard  
18 to causation, Hislop opines that "the death of Mostek was proximately caused by the  
19 recklessness of the policy maker and the jail staff as evidenced by inadequate training on  
20 suicide prevention, CPR, and Housing Classification." Id. ¶ 17. Hislop further states,  
21 without elaboration, that "[i]ssues raised by the grand jury[,] including lack of adequate  
22 leadership, jail staff safety, and the jail's inabilit[y] to deal with the mentally ill . . . further  
23 strengthen [my] conclusion."<sup>7</sup> Id. The Court finds that Hislop's conclusory opinion is  
24 insufficient to avoid summary judgment. See Soremekun v. Thrifty Payless, Inc., 509 F.3d  
25

26 <sup>7</sup> While Plaintiff's opposition mentions the fact that "Grand Juries from 2005-2010  
27 have reported numerous issues of the NCDC," Plaintiff has failed to direct the Court to any  
28 specific statements or findings set forth in any Napa County Grand Jury Report or  
otherwise explain with any specificity the relevance of these reports to her § 1983 claim.  
Plaintiff's opposition provides no meaningful discussion of these reports.

1 978, 984 (9th Cir. 2007) ("Conclusory, speculative testimony in affidavits and moving  
2 papers is insufficient to raise genuine issues of fact and defeat summary judgment.").  
3 Plaintiff has not proffered sufficient evidence to establish a genuine issue of material fact as  
4 to whether any particular omission or deficiency in the County's training program was the  
5 moving force behind Mostek's death.

6 Finally, the Court notes that, without any elaboration or analysis, Plaintiff asserts  
7 that "the failure to relay the information regarding Mostek's suicidality" was a failure to  
8 train" and that "a proper Housing Classification procedure is to ensure, in part, that suicidal  
9 persons are properly cared for and that proper training is required to ensure this." Pl.'s Opp.  
10 at 14. Other than these conclusory assertions, Plaintiff offers no discussion regarding these  
11 issues. Plaintiff does not cite any evidence in support of the first assertion. In support of  
12 the second assertion, Plaintiff directs the Court to paragraph 17 of her correctional expert's  
13 declaration, which opines "[t]here was improper and inadequate training with regard to  
14 proper housing and with regard to relaying information regarding mental issues to the  
15 officers at the jail." Hislop Decl. ¶ 17. Hislop further states that "[a] review of the  
16 deposition transcripts of the officers, and the alleged training records," exposes the  
17 "inadequacies" of the County's training. Id. However, conclusory expert assertions cannot  
18 raise triable issues of material fact on summary judgment.' " Lake v. First Nat. Ins. Co. of  
19 America, 2011 WL 873142, at \* 2 (N.D. Cal. 2011) (Armstrong, J.) (quoting Sitrick v.  
20 Dreamworks, LLC, 516 F.3d 993, 1001 (Fed. Cir. 2008)); see also Soremekun, 509 F.3d at  
21 984. Accordingly, Plaintiff has failed to raise a genuine issue of material fact as to whether  
22 these alleged deficiencies in the County's training program amount to deliberate  
23 indifference and were the moving force behind Mostek's death. See F.T.C. v. Stefanchik,  
24 559 F.3d 924, 929 (9th Cir. 2009) (non-movant's bald assertions or a mere scintilla of  
25 evidence in his favor are both insufficient to withstand summary judgment).

26 **b. Medical Indifference**

27 Plaintiff contends that a triable issue of fact exists as to "whether the County failed  
28 to provide competent medical care to Mostek because Gardner was not adequately licensed



1 or trained to work in his capacity at the jail, and because other circumstances at the jail  
2 relating to medical care prove Defendant's deliberate indifference." Pl.'s Opp. at 16. More  
3 specifically, Plaintiff argues that Gardner failed to provide competent care to Mostek  
4 because, among other things, he did not place him in a safety cell or a cell with another  
5 inmate where Mostek would be within view of an officer at all times during the March  
6 period of incarceration. Id. at 18. Plaintiff further argues that Gardner's certification as a  
7 Marriage and Family Therapist is not sufficient to perform counseling and evaluation of  
8 inmates at risk of suicide." Id. In support of these contentions, Plaintiff cites "See  
9 Declaration of Dr. Martin Williams," id., which is improper. See Fed.R.Civ.P. 56(c)(1)(A)  
10 (a party asserting that a fact is genuinely disputed must support the assertion by "citing to  
11 particular parts of materials in the record"); Southern Cal. Gas Co., 336 F.3d at 889 (the  
12 party opposing summary judgment must direct the court's attention to specific, triable  
13 facts).

14 According to Plaintiff, "the care provided by Gardner at the jail was incompetent  
15 and that the jail was therefore deliberately indifferent." Pl.'s Opp. at 19. Plaintiff further  
16 argues that the following "circumstances substantiate the fact that the medical care was  
17 incompetent": the County's failure to have a "vehicle" for informing officers that inmates  
18 may be at risk for suicide, the County's failure to adequately train correctional officers in  
19 suicide prevention, and the County's failure to have an enforceable policy regarding suicide  
20 prevention. Id. Plaintiff claims that this conduct "illustrates a custom and policy of  
21 inadequate and incompetent medical care within the jail." Id.

22 As an initial matter, the Court notes that Plaintiff has not argued or adduced  
23 evidence showing that Gardner violated Mostek's constitutional rights by failing to address  
24 his serious medical needs. See Gibson, 290 F.3d at 1187-1188 (under the Eighth  
25 Amendment, "a person is liable for denying a prisoner needed medical care only if the  
26 person 'knows of and disregards an excessive risk to inmate health and safety' "); Simmons,  
27 609 F.3d at 1018 (to show that a correction facility official violated a constitutional right by  
28 failing to address his medical needs, a plaintiff must show that the official was (1)

1 subjectively aware of the serious medical need; and (2) failed to adequately respond).  
2 Plaintiff has not proffered evidence demonstrating that Gardner was subjectively aware that  
3 Mostek was in substantial danger of killing himself yet deliberately ignored such risk. See  
4 Simmons, 609 F.3d at 1018-1019.

5       Instead, Plaintiff points to the opinion of her medical expert, who states, among  
6 other things, that Gardner provided incompetent care because he should have taken action  
7 to ensure that Mostek was in a safety cell or a cell with another inmate where correctional  
8 officers could observe him. Pl.'s Opp. at 18 (citing "Declaration of Dr. Martin Williams").  
9 At most, Plaintiff has raised an issue as to whether Gardner engaged in malpractice or was  
10 negligent in treating Mostek. However, a showing of medical malpractice or negligence is  
11 insufficient to establish a constitutional deprivation under the Eight Amendment.  
12 Simmons, 609 F.3d at 1019.

13       Moreover, even assuming that Gardner was deliberately indifferent to Mostek's  
14 serious medical needs, Plaintiff has failed to adduce sufficient evidence to establish that the  
15 alleged unconstitutional act results from: "(1) an employee acting pursuant to an expressly  
16 adopted official policy; (2) an employee acting pursuant to a longstanding practice or  
17 custom; or (3) an employee acting as a 'final policymaker.'" Delia v. City of Rialto, 621  
18 F.3d 1069, 1081-1082 (9th Cir. 2010). "A plaintiff cannot prove the existence of a  
19 municipal policy or custom based solely on the occurrence of a single incident or  
20 unconstitutional action by a non-policymaking employee." Davis v. City of Ellensburg,  
21 869 F.2d 1230, 1233 (9th Cir. 1989). The Supreme Court has explained:

22       Proof of a single incident of unconstitutional activity is not sufficient to  
23 impose liability under Monell, unless proof of the incident includes proof that  
24 it was caused by an existing, unconstitutional municipal policy, which policy  
25 can be attributed to a municipal policymaker. Otherwise the existence of the  
26 unconstitutional policy, and its origin, must be separately proved. But where  
27 the policy relied upon is not itself unconstitutional, considerably more proof  
28 than the single incident will be necessary in every case to establish both the  
requisite fault on the part of the municipality, and the causal connection  
between the 'policy' and the constitutional deprivation.

City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-824 (1985).

In the absence of a formal municipal policy, a plaintiff must show a "longstanding

1 practice or custom which constitutes the standard operating procedure of the local  
2 governmental entity." Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996). A plaintiff must  
3 establish that the custom or practice is "so 'persistent and widespread' that it constitutes a  
4 'permanent and well settled city policy.'" Id. ("Liability for improper custom [under  
5 Monell] may not be predicated on isolated or sporadic incidents; it must be founded upon  
6 practices of sufficient duration, frequency, and consistency[.]").

7 Here, Plaintiff contends that municipal liability can be predicated on one incident of  
8 inadequate medical care. In support of her position, Plaintiff cites Cabralles v. County of  
9 Los Angeles, 864 F.2d 1454 (9th Cir. 1988), vacated on other grounds, 490 U.S. 1087  
10 (1989), opinion reinstated, 886 F.2d 235 (9th Cir. 1989). Plaintiff's reliance on Cabralles is  
11 misplaced. In that case, the plaintiff alleged that the County had a policy or custom that  
12 resulted in serious medical under-staffing at the jail such that "psychiatric staff could only  
13 spend minutes per month with disturbed inmates." Id. at 1461. The Ninth Circuit  
14 concluded that the district court properly denied a motion for summary judgment because  
15 there was evidence that medical understaffing at the jail constituted a policy of the County  
16 through its policymaker amounting to "deliberate indifference to the medical needs of the  
17 inmates at the jail," which directly contributed to the decedent's suicide. Id. at 1461-1462  
18 (noting that "[t]he district court could conclude that lack of time and resources meant, in the  
19 decedent's case, that any psychological illness he had would go undiagnosed and  
20 untreated").

21 Plaintiff has not proffered evidence showing that the County through a policymaker  
22 had a policy amounting to "deliberate indifference to the medical needs of the inmates at  
23 the jail." At most, Plaintiff has introduced evidence that one inmate received inadequate  
24 medical care from Gardner on one occasion. However, even assuming Plaintiff has shown  
25 a constitutional violation, proof of a single incident of unconstitutional activity is not  
26 sufficient to impose municipal liability, unless proof of the incident includes proof that it  
27 was caused by an existing, unconstitutional municipal policy, which can be attributed to a  
28 County policymaker. Plaintiff has not offered such proof.

1 Contrary to Plaintiff's suggestion, her medical expert's opinion that Gardner is not  
2 qualified to perform counseling and evaluation of inmates at risk of suicide, does not create  
3 a genuine issue of material fact as to whether the County had a policy of deliberate  
4 indifference to the medical needs of the inmates at Napa County Jail. Plaintiff has not  
5 argued, let alone shown, that the County had a policy or custom of employing unqualified  
6 medical staff amounting to deliberate indifference to the medical needs of inmates. As for  
7 the remaining "circumstances" that Plaintiff claims "substantiates the fact that the medical  
8 care was incompetent" and "illustrates a custom and policy of inadequate and incompetent  
9 medical care within the jail," the conclusory statements offered by Plaintiff are insufficient  
10 to avoid summary judgment. See Surrell v. California Water Service Co., 518 F.3d 1097,  
11 1103 (9th Cir. 2008) ("Conclusory statements without factual support are insufficient to  
12 defeat a motion for summary judgment."). In short, Plaintiff has failed to avoid summary  
13 judgment by coming forward with evidence from which a jury could reasonably render a  
14 verdict in her favor. Anderson, 477 U.S. at 252.

15 **c. County Policies**

16 Plaintiff contends that there is a triable issue of fact as to whether the County was  
17 deliberately indifferent with respect to its policies regarding suicide prevention, housing of  
18 inmates, and medical and psychological training and care. Pl.'s Opp. at 20. More  
19 specifically, Plaintiff argues that the County's "suicide prevention practices" at the Napa  
20 County Jail "were a policy and custom of omission closely related to Mostek's injury." Id.  
21 at 21. In addition, Plaintiff argues that the County's "housing practices are . . . a policy and  
22 custom of omission closely related to Mostek's injury." Id. at 22.

23 Municipal liability may be imposed where a municipality's omission led to a  
24 constitutional violation by its employee. Gibson, 290 F.3d at 1186. Under this route to  
25 municipal liability, the "plaintiff must show that the municipality's deliberate indifference  
26 led to its omission and that the omission caused the employee to commit the constitutional  
27 violation." Id. Deliberate indifference requires a showing "that the municipality was on  
28 actual or constructive notice that its omissions would likely result in a constitutional

violation." Id. To prove that the policies were the moving force behind the County employee's violation of plaintiff's constitutional rights, plaintiff must show that the County could have prevented the constitutional violation with an appropriate policy. Id. at 1194.

#### **i. Suicide Prevention**

Without citation to evidence, Plaintiff broadly contends that that the County's "suicide prevention policy is only a suggestion for [correction officers], so that it seems [the County] had no enforceable [sic] suicide prevention policy at all." Pl.'s Opp. at 21. According to Plaintiff, if "an adequate suicide prevention policy was required, it was clearly not followed or enforced." Id. Plaintiff also asserts, without evidentiary support, that the "jail failed to provide adequate training on psychological health (including necessary training on . . . suicide prevention)," and has a "policy of refusing to communicate to guards the specific dangers faced by mental health inmates" including that an inmate has previously attempted suicide. Id. Finally, Plaintiff vaguely asserts that "the Napa County Grand Jury has raised concerns over the jail's ability to deal with mental health issues which is directly related to training. . . . It has been raising concern after concern over how the jail is run for at least half a decade including failures in leadership, organization, and especially safety . . . . Policy makers at the jail were . . . well informed regarding these failures. . . . Both of Plaintiff's experts have testified to causation regarding these issues." Id.

The Court finds that Plaintiff's conclusory assertions in support of this argument are insufficient to avoid summary judgment. See Surrell, 518 F.3d at 1103. Plaintiff did not adduce any evidence establishing a policy or custom of omission regarding the County's "suicide prevention practices" that was the moving force behind Mostek's death. Plaintiff has not come forward with evidence from which a jury could reasonably render a verdict in her favor.

#### **ii. Housing Policy**

Without citation to evidence, Plaintiff points to the Napa County Jail's "ongoing policy and procedure against communicating the housing classification information to the

guards" as one of the deficiencies of the housing policy. Pl.'s Opp. at 22 (emphasis in original). Plaintiff argues that this "information is . . . necessary for the guards own safety and the safety of the inmates." Id. In addition, Plaintiff asserts, without elaboration, that "[b]oth of [her] experts have testified that Mostek was in the wrong cell stating that since he was not in a safety cell . . . he should have had a cell mate and received constant observation." Id. In support of this assertion, Plaintiff only directs the Court to paragraph 10 of her medical expert's declaration, which states: "it is my opinion that the incompetent medical care received by decedent Mostek at the Napa County Jail was the proximate cause of his death. Based upon all of Mostek's conditions, he should have been kept in a safety cell, or placed in a cell with another inmate and within view of an officer at all times." Williams Decl. ¶ 10.

The Court finds that Plaintiff has failed to adduce evidence showing that the County has a policy of failing to communicate housing classification information to correctional officers. Moreover, even assuming the County has such a policy, the Court finds that Plaintiff has failed to proffer evidence that the County's deliberate indifference led to its policy of omission and that any failed communication was the moving force behind Mostek's death. As for the placement of Mostek in a safety cell, Plaintiff has not identified any County policy or custom of omission with respect to the County's housing of inmates. Plaintiff did not present evidence demonstrating that the decision to place Mostek in Tank 1, instead of a safety cell or a cell with another inmate within view of an officer, is connected to a County policy or custom of omission that was the moving force behind Mostek's death. Accordingly, Plaintiff has failed to avoid summary judgment by coming forward with evidence from which a jury could reasonably render a verdict in her favor. Anderson, 477 U.S. at 252.

**d. Standard Operating Procedure of Indifference**

Finally, Plaintiff contends that there is a triable issue of fact as to whether the County employed a standard operating procedure of indifference toward the inmates at the jail based upon its "numerous failures." Pl.'s Opp. at 23. Without citation to evidence,

1 Plaintiff argues "[f]or the same reasons stated above, plaintiff asserts that the failures of  
2 defendant to have, follow, and enforce proper custom and procedure is the 'standing  
3 operating procedure' of the jail. . . . [I]t is evidenced by the failures at the jail including but  
4 not limited to its failed training custom for monitoring psychological health, its policy with  
5 regard to identifying and handling suicidal inmates, its alleged policy with regard to  
6 ensuring pertinent information is passed on to the guards within the facility, its policy with  
7 regard to monitoring recidivism, and its overall apparent policy with regard to the  
8 management of the mentally ill." Id.

9 The Court finds that Plaintiff's conclusory argument is insufficient to survive the  
10 County's motion for summary judgment. Conclusory statements without factual support  
11 are insufficient to create a genuine issue of material fact for trial. See Surrell, 518 F.3d at  
12 1103. The party opposing summary judgment must direct the court's attention to specific,  
13 triable facts. See Southern Cal. Gas Co., 336 F.3d at 889. Plaintiff has failed to adduce any  
14 evidence demonstrating that Mostek's death was the result of a longstanding practice or  
15 custom which constitutes the standard operating procedure of the local government entity  
16 and that this practice or custom was the moving force behind Mostek's death. See Price v.  
17 Sery, 513 F.3d 962, 966 (9th Cir. 2008) (stating that plaintiffs may "establish municipal  
18 liability by demonstrating that . . . the constitutional tort was the result of a longstanding  
19 practice or custom which constitutes the standard operating procedure of the local  
20 government entity").

## 21 2. Remaining State Law Claims

22 All of Plaintiff's remaining claims are based on state law. The Court has  
23 supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367. Under 28 U.S.C.  
24 § 1367(c)(3), a district court may decline to exercise jurisdiction over supplemental state  
25 law claims if "the district court has dismissed all claims over which it has original  
26 jurisdiction." When removal is based on the presence of a federal claim, a district court  
27 may remand pendent or supplemental state law claims to the state court once the federal  
28 claim has been eliminated. See Lee v. City of Beaumont, 12 F.3d 933, 937 (9th Cir. 1993)



1 ("it is generally preferable for a district court to remand remaining pendent claims to state  
2 court") overruled on other grounds, California Dept. of Water Resources v. Powerex Corp.,  
3 533 F.3d 1087 (9th Cir. 2008). Given that the federal claim has been eliminated and only  
4 state law claims remain, the Court exercises its discretion and remands Plaintiff's remaining  
5 state law claims to state court. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351  
6 (1988) ("When the single federal-law claim in the action was eliminated at an early stage of  
7 the litigation, the District Court had a powerful reason to choose not to continue to exercise  
8 jurisdiction."); Harrell v. 20th Century Ins. Co., 934 F.2d 203, 205 (9th Cir. 1991) ("it is  
9 generally preferable for a district court to remand remaining pendant claims to state  
10 court.").

### 11 **III. CONCLUSION**

12 For the reasons stated above, IT IS HEREBY ORDERED THAT:

- 13 1. Plaintiff's ex parte application for leave to supplement her opposition is  
14 DENIED.
- 15 2. The County's motion for summary judgment is GRANTED as to Plaintiff's §  
16 1983 claim.
- 17 3. The Court declines to assert supplemental jurisdiction over Plaintiff's  
18 remaining state law claims and REMANDS the action to the Napa County Superior Court.
- 19 4. The Clerk shall close the file and terminate all pending matters.

20 IT IS SO ORDERED.

21 Dated: March 29, 2013

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24 SAUNDRA BROWN ARMSTRONG  
25 United States District Judge  
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